

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002



Date Issued: June 10, 1999

Case No.: 1997-INA-0009

In the Matter of:

MARIANO D. MOLINA, P.C. CONSULTING ENGINEERS,
Employer,

On behalf of

YOUNG BEOM KIM,
Alien.

Certifying Officer: Dolores Dehaan, Region II

Appearance: Ronald H. Fanta, Esq.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application for labor certification filed by Mariano D. Molina, P.C. Consulting Engineers for the position of Engineer/Project Designer for Young Beom Kim, Alien (AF 8). The duties of the job were described as follows:

Employee will have responsibility for the design of complete mechanical structures, including heating, ventilation and air conditioning systems for hospitals, high rise office buildings, prisons, schools and other similar structures. Employee will prepare cooling and heating load calculations based upon anticipated building usage and regulatory codes. Employee will develop various HVAC options based upon anticipated building usage, load calculations and regulatory codes, using different types of chillers, cooling towers, boilers, pumps and air conditioning units. Employee will prepare estimate cost projections base upon the various options. Employee will supervise and schedule draftsmen and staff engineers.

Employer required that applicants have a Bachelor of Science Degree in Mechanical Engineering and four years of experience in the job offered.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on April 4, 1996 (AF 56-59), finding that Employer must document that U. S. workers who applied for the job were rejected for lawful job-related reasons. The CO stated that the following U.S. applicants are qualified for the position based upon their resumes and were rejected for other than lawful job-related reasons: Adi Yerramsetty, Prem Kumar Bajaj and Richard Chen. The CO also stated that in view of the applicants' responses to questionnaires about what transpired during the recruiting period, Employer's actions did not demonstrate good faith efforts to recruit U.S. workers for this job. The CO stated further that Employer must document postal or telephonic attempts to contact the applicants. The CO noted that Mr. Molina filed an October 10, 1995 recruitment report wherein he stated that "Mr. Yerramsetty was extensively interviewed by the undersigned." However, Mr. Yerramsetty reported that he was contacted on the phone by "Mr. Richard." The CO instructed Employer to submit clear and consistent documentation that Mr. Richard Thomas is the Employer's usual representative who normally interviews job applicants. 20 C.F.R. § 656.20(b)(3)(ii). The CO also stated that the

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

NOF is not a request for Employer to contact and interview the applicants. Rather, Employer was instructed to submit further documentation that the applicants were not qualified, willing, or available at the time of initial referral and consideration.

Employer, by counsel, submitted rebuttal on June 11, 1996 (AF 60-80). Mariano D. Molina, President, stated that Richard Thomas is the head of the HVAC and Mechanical Department; that he normally conducts the recruitment of new mechanical and project engineers; that Mr. Thomas extensively interviewed Adi Yerramsetty on October 4, 1995; that Mr Yerramsetty fell short in the area of design of HVAC systems because,

(a) the length of time (9 years) not being involved in this field; (b) his resume (showing employment 9 years ago) did not indicate that he has been involved in the design of HVAC systems; (c) his experience with the local codes as HVAC design (sic). Furthermore, ...we would like to reemphasis (sic) to your office that no where (sic) in Mr Adi Yerramsetty's resume that he acknowledged having this experience. It was for that reason that we did not offer this job position to Mr. Adi Yerramsetty.

(AF 78)

Mr. Molina stated that Employer made numerous and repeated attempts to contact Prem Humar Bajaj before October 10, 1995, the last day of the recruitment period; that those attempts included telephone calls and certified mail; that Mr. Bajaj called employer on October 18, 1995; that Employer requested Mr. Bajaj call back during the week of October 23, 1995 to arrange an interview; that Mr. Bajaj never called back. Mr. Molina stated further that Employer also made repeated attempts to contact Richard Chen by telephone and then sent a certified letter to him, but that Mr. Chen never contacted Employer. Copies of telephone bills and certified mailing receipts were submitted with rebuttal (AF 72-75).

The CO issued a Final Determination denying certification on June 14, 1996 (AF 81-85). The CO stated that Employer's telephone bill reflects that the conversation with Mr. Yerramsetty lasted seven minutes; that it does not appear possible that an extensive in depth interview could have taken place during seven minutes; that Employer does not dispute Mr. Yerramsetty's contention in his questionnaire response that he was contacted by telephone and told that he will be contacted again to arrange an interview. The CO stated further that it appears that this applicant was rejected for other than lawful job-related reasons; that based on Mr. Yerramsetty's resume and qualifications, a good faith effort to recruit this applicant would have included interviewing him for the position.

The CO stated that Employer submitted no telephone bills listing calls to applicant Prem Kumar Bajaj. Therefore, there is no documentation to support Employer's statement that repeated efforts were made to contact this applicant. The CO noted that the applicant's resume was sent to Employer by EDD on September 5, 1995 and that Employer did not send a letter to Mr. Bajaj until October 10, 1995, the day Employer's recruitment report was due at EDD. The CO stated that the letter to Mr. Bajaj could not have been received until after expiration of the recruitment period; that it does not appear that Employer made a good faith effort to contact this

applicant in a reasonable period of time; that Mr. Bajaj appears to have been rejected for other than lawful job-related reasons.

Regarding Employer's alleged attempts to contact Richard Chen by telephone, the CO stated that the submitted telephone bill does not indicate the telephone number in Houston, Texas that Employer called six times prior to July 31, 1995. However, it does not seem plausible that it was Mr. Chen's number since his resume was not sent to Employer until August 30, 1995. The CO stated further that the certified letter sent to Mr. Chen on October 10, 1995 could not have been received until after the recruitment period, which ended on October 10, 1995.

The CO also stated that Employer had failed to submit clear and consistent documentation evidencing that Richard Thomas is the Employer's usual representative who interviews job applicants; that Employer's rebuttal statements regarding Mr. Thomas are unsupported and not directly responsive to the NOF.

The CO concluded that "In light of the applicant's apparent qualifications, the Employer's lack of adequate supporting documentation, and the statements made by applicants, it is held that the Employer did not adequately demonstrate/document that Mr. Thomas was the company's normal hiring authority for matters other than those involving labor certification, such as the immediate case, and, the Employer failed to demonstrate good faith efforts to recruit a U.S. worker for this employment opportunity." (AF 81)

Employer, by counsel, requested administrative-judicial review of the denial of certification on July 5, 1996 (AF 86-96).

Discussion

The issues are whether Employer recruited U.S. workers in good faith and rejected them solely for lawful job-related reasons.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

Richard Chen's resume reflects that he lives in Houston, Texas, has a Bachelor and Master's degree in Mechanical Engineering and more than ten years of experience with heating and cooling systems. In fact, Mr. Chen states in his resume that he has a "[s]olid background in heat transfer, fluid dynamics, HVAC, and mechanical design." (AF 34). Employer contends that he tried repeatedly to contact this applicant by telephone and then by certified mail but that Mr. Chen did not respond. However, the documentation submitted by Employer does not support Employer's contentions. The telephone bill does not list the number(s) called in the Houston area and it covers a billing period that expired a month before Employer received Mr. Chen's resume from EDD. Surely, Employer was not trying to call Mr. Chen the month before he received his resume; any suggestion that he was is not credible. Moreover, Employer's attempt to contact Mr. Chen by certified mail more than five weeks after receipt of his resume and on the last day of the recruitment period does not evidence good faith efforts to recruit this applicant. *Creative Cabinet and Store Fixture*, 89-INA-181 (Jan. 24, 19990)(*en banc*).

Prem Bajaj's resume reflects that he has a Bachelor's degree in Mechanical Engineering and over twenty years of experience in heating and cooling system design, etc (AF 38). He appears to be a qualified applicant. Employer stated in rebuttal that he tried repeatedly to contact Mr. Bajaj by telephone and then by certified mail. However, Employer submitted no documentation of attempted telephone contacts with this applicant and the letter was sent to Mr. Bajaj on the last day of the recruitment period, more than thirty days after Employer received the applicant's resume. Again, we conclude that Employer's unsubstantiated contentions of attempts to contact this applicant by telephone cannot be credited and the delay in contacting this applicant by mail supports a conclusion that Employer did not recruit Mr. Bajaj in good faith.

In view of these findings, we see no reason to address additional issues surrounding Employer's recruitment of Mr. Adi Yerramsetty or whether Mr. Richard Thomas is a person who normally interviews job applicants for Employer. 20 C.F.R. § 656.20(b)(3)ii). We conclude on the basis of this record that Employer did not recruit U.S. workers in good faith and that U. S. workers were rejected for other than lawful job-related reasons. Accordingly, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary

to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

